Filed 6/30/09 P. v. Armendariz CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICKEY LAMAR ARMENDARIZ, Defendant and Appellant.	G040208 (Super. Ct. No. FBA008347) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Steve Malone, Judge. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meagan Beale and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Rickey Lamar Armendariz of attempted, premeditated murder (Pen. Code, §§ 664, 187, subd. (a); count 1)[1] and shooting at an occupied motor vehicle (§ 246; count 2), and found true enhancement allegations for personally and intentionally discharging a firearm (§ 12022.53, subd. (c); counts 1 & 2) personally and intentionally discharging a firearm and proximately causing great bodily injury (§ 12022.53, subd. (d); counts 1 & 2), personally using a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b); counts 1 & 2), being an armed principal in the commission of the crimes (§ 12022, subd. (a)(1); count 1), and personally causing great bodily injury (§ 12022.7, subd. (a); counts 1 & 2). The trial court sentenced Armendariz to life with the possibility of parole for attempted murder and imposed a consecutive term of 25 years to life for the personal discharge of a firearm causing great bodily injury. The court imposed and stayed sentence on count 2 and all other sentencing enhancement allegations.

Armendariz contends: (1) The trial court committed *Aranda/Bruton*[2] error by admitting evidence of recorded telephone calls made by his codefendant, Ruben Mendoza; (2) there is insufficient credible evidence of his identity as the perpetrator of the alleged crimes; (3) the jury improperly relied on the prosecution's aiding and abetting theory to find true enhancements that require personal use of a gun and personal infliction of great bodily injury; (3) the prosecutor engaged in certain acts of misconduct; (4) the trial court improperly imposed and then stayed a section 12022.53, subdivision (d) sentence enhancement; and (5) the jury improperly found true certain sentencing enhancements associated with count 2, shooting at an occupied vehicle, because this

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1 All further statutory references are to the Penal code unless otherwise stated.

2 *People v. Aranda* (1965) 65 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

offense is not mentioned in section 12022.53, subdivisions (b) and (c). We reject Armendariz's contentions and affirm the judgment.[3]

I

FACTS AND PROCEDURAL HISTORY

One weekend in February 2005, Brandon Johnson went to Barstow, California, to visit his girlfriend, Jessica Crotzer. Around 1:00 a.m. on February 13, Johnson and Crotzer heard a knock on the front door of Crotzer's home. Crotzer answered the door and allowed Armendariz and Mendoza to come inside. They angrily told Johnson to leave. Mendoza asked Armendariz if he should "get the heat," which Johnson understood to mean get a gun. Johnson told the men that he was just visiting Crotzer, and he walked outside to smoke a cigarette.

While he was outside, Johnson noticed a Chevrolet Tahoe parked in front of Crotzer's home. A few minutes later, Johnson drove away from Crotzer's home in his uncle's 1985 Cadillac Eldorado. However, he soon realized that he had forgotten some personal belongings. Johnson stopped at a nearby gas station and made a telephone call to Crotzer. He asked her permission to return for his belongings. When Johnson returned to Crotzer's home, he saw that the Tahoe was still parked in front of her house.

Armendariz answered Johnson's knock on the front door. He told Johnson to "Get the 'F' out of here." Johnson explained that he was there just to retrieve his belongings, but Armendariz told Johnson to "get on." Johnson then heard Mendoza say to Armendariz, "You want to get the heat?" At that point, Johnson decided to leave without his belongings because they were not worth getting killed over. Nevertheless,

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[3] Armendariz's opening brief raised an additional issue regarding the trial court's pretrial severance of his case from his codefendant's for trial. As he acknowledges, the trial court's order was subsequently reversed by division two of this court. On May 27, 2008, appellate counsel filed a letter brief withdrawing the severance issue on the ground that the appellate court's decision constitutes law of the case as to that issue and is therefore binding on this court. (*People v. Gray* (2005) 37 Cal.4th 168, 196-198.)

Crotzer walked out with a bag full of his things before he could drive away for the second time.

As Johnson slowly drove down Main Street in Barstow, he noticed that the Tahoe he had seen in front of Crotzer's house was now driving toward him. He estimated the Tahoe's speed at 60 miles per hour. Johnson sped up in an effort to outrun the Tahoe, but his car would not go faster than 85 or 90 miles per hour. At one point, the Tahoe pulled alongside Johnson's car. Within moments, the passenger window came down, and Johnson saw Armendariz point a brown-handled pistol at him. Armendariz fired at least four shots at Johnson. The windows in Johnson's car were shattered and there was damage to the driver's side door and seat. Johnson was wounded in his left hip and his legs went numb, and he heard one more shot before the Tahoe fled the scene.

Notwithstanding his serious injuries, Johnson managed to drive to a gas station and flag down a police officer. Johnson explained what had happened and gave the officer Crotzer's telephone number. After Johnson was transported to the hospital, two officers went to Crotzer's home. She told them that Armendariz and Mendoza had been at her home when Johnson was there, and that they had told Johnson to leave. She confirmed that Johnson came back for his belongings, and that Armendariz and Mendoza had followed him in their SUV. However, at trial, Crotzer denied knowing Armendariz, and she told the jury that she was not sure Mendoza had been at her home that night. She also denied telling any police officers that both men had been at her home on the night of the shooting.

Police officers found Armendariz at his girlfriend's house a few hours after the shooting. He was in bed with his girlfriend, and the officers found a loaded Colt Super .38 caliber semiautomatic pistol between the couple's mattress and box springs. Crime scene investigators found two .38 caliber shell casings on the road where Johnson had been shot. A firearms expert compared marks on the two shell casings with casings fired from the gun found under Armendariz's mattress, but the results of these tests were

inconclusive. Armendariz was subjected to testing for gunshot residue (GSR), and the test revealed a single GSR particle on his left hand. At trial, an expert testified that GSR particles can adhere to an individual's skin or clothing even if this person has not recently fired a gun.

There were no GSR particles on Mendoza, his clothing, or inside his gray Chevrolet Tahoe, and the result of a comparison of his Tahoe's tires to tracks found in front of Crotzer's home was inconclusive. However, Mendoza's DNA and one of his fingerprints were found on a Pepsi can recovered from Crotzer's house. Monica Seiwertsen of the San Bernardino County Sheriff's Department forensic biology unit conducted the DNA analysis. She admitted inadvertently mixing up the samples when she placed them into their respective envelopes. However, she also testified that she had realized the error shortly after it occurred and had retested one of the samples to ensure accuracy.

Armendariz and Mendoza were charged with attempted first degree murder and shooting at an occupied motor vehicle. The information also alleged several enhancements with respect to both counts, including discharge of a firearm causing great bodily injury, personal discharge of a firearm, personal use of a firearm, and personal infliction of great bodily injury. While Armendariz and Mendoza were in custody, jail personnel recorded their telephone conversations. In more than one conversation, Armendariz referred to Mendoza by a nickname and by his first name. He also questioned a couple of people in an effort to determine how his girlfriend would testify. Mendoza threatened to tie up Crotzer and throw her in a closet to keep her from testifying.

Armendariz did not testify on his own behalf. At trial, Crotzer denied that he was the person who had come to her home on February 13, 2005. However, the prosecution presented evidence that after her testimony, Mendoza talked to one of his

friends who had been in court that day, and a police officer saw this friend follow Crotzer to her home. The jury heard Mendoza ask his friend, "Did you ever get rid of that yet?"

Jessie Oropeza testified that he and Mendoza had been at a restaurant until midnight on the night of the shooting. Belky Ramirez, a visitor at a house on Main Street on the night of the shooting, testified that she had seen a yellow Cadillac driving in the area after the shots were fired.

A forensic scientist performed a technical review of the case and noticed the DNA analyst's error in handling the samples. The defense expert testified that she would have retested all of the samples, not just one, to ensure accuracy. She also criticized the sheriff's department analyst for writing down packaging information days before she actually performed the testing.

II

DISCUSSION

Aranda/Bruton Error

The trial court ordered separate juries for Armendariz and Mendoza after the district attorney stated his intention to introduce evidence of their recorded telephone conversations. However, the trial court also permitted the prosecution to play redacted versions of eight of Mendoza's recorded calls for Armendariz's jury. The recordings included Mendoza's threatening statements about Crotzer. The trial court admitted these statements as declarations against penal interest, and told Armendariz's jury that Mendoza's calls were admitted for the sole purpose of evaluating Crotzer's testimony.

On appeal, Armendariz contends the admission of Mendoza's recorded telephone calls violated his Sixth Amendment right to confront and cross-examine adverse witnesses. He argues that Mendoza's statements amounted to an admission of guilt, which the jury could have improperly applied to his case, and he contends the trial court committed *Aranda/Bruton* error because Mendoza's incriminating statements could

have led to a conviction of the underlying crimes on an improper aiding and abetting theory.[4] We find no merit in any of these contentions.

The Confrontation Clause applies only to *testimonial hearsay*. "Under *Crawford* . . . the Confrontation Clause has no application to [an out-of-court nontestimonial statement not subject to cross-examination] and therefore permits their admission even if they lack indicia of reliability." (*Whorton v. Bockting* (2007) 549 U.S. 406, 520.) *Bruton,* like *Crawford,* is based solely on the Confrontation Clause. Therefore, *Bruton,* like *Crawford*, is inapplicable where the statements at issue are nontestimonial. As stated by the United States Supreme Court, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*).)

The statements in *Davis* were made during a 911 emergency call. The United States Supreme Court concluded that these statements were nontestimonial because a 911 call "is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." (*Davis, supra,* 547 U.S. at p. 827.) On the other hand, the United States Supreme Court has not yet considered or decided "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" (*Id.* at p. 823, fn. 2.)

The California Supreme Court has considered this issue. In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), the victim made a statement to a physician about the underlying crime. The Supreme Court concluded that the victim's statement was nontestimonial. "Objectively viewed, the primary purpose of the question, and the

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[4] At trial, Armendariz also asserted admission of Mendoza's recorded telephone conversations constituted testimonial evidence within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The trial court overruled this objection, and that ruling is not challenged on appeal.

answer, was not to establish or prove past facts for possible criminal use, but to help Dr. Russell deal with the immediate medical situation he faced." (*Id.* at p. 986.)

Here, Armendariz's conversations with his friends and family were nontestimonial. None of the speakers on the recordings was acting as "[a witness] against the accused" (*Davis, supra,* 547 U.S. at p. 823), nor were the conversations "made to *law enforcement agents* in the context of *criminal investigations or inquiries*." (*Cage, supra,* 40 Cal.4th at p. 987.) No "structured questioning" occurred, and neither Armendariz, Mendoza, nor their friends and relatives, made any effort to "record or memorialize [their] statements for later legal use." (*Ibid.*) Although Armendariz, Mendoza, and their friends and relatives were warned that the calls were "subject to monitoring and recording," it appears as though they believed these conversations were private. Furthermore, they clearly were not trying to establish past facts for use in a criminal prosecution, but to ensure those facts were never admitted into evidence. Therefore, the statements made during these telephone conversations were nontestimonial and not subject to the Confrontation Clause. Accordingly, the trial court did not err in overruling Armendariz's Confrontation Clause objections to the admission of this evidence.

With respect to counsel's hearsay objection, we review the trial court's ruling for an abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 536.) The Attorney General contends the trial court properly found Mendoza's statements admissible under the declaration against penal interest exception, relying primarily on *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*).) We agree.

In *Greenberger*, defendants Greenberger, Mentzer, Marti, and Lowe were tried jointly for the murder of Roy Radin. William Rider was an acquaintance of Mentzer, Marti and Lowe. Rider obtained statements separately from Lowe and Mentzer, and "[s]ome of Lowe's statements implicated Mentzer, and some of Mentzer's statements

implicated Marti and Lowe." (*Id.* at p. 325.) The trial court admitted the statements against all of the defendants, relying on Evidence Code section 1230.[5] (*Ibid.*)

On appeal, Mentzer, Marti, and Lowe argued that the trial court erred in admitting these statements because it denied the nondeclarant the right of confrontation. The appellate court found no error. "Any such statement must satisfy the statutory definition of a declaration against interest and likewise satisfy the constitutional requirement of trustworthiness. This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; . . . .' [Citation.]" (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 332.)

Although *Greenberger* is a pre-*Crawford* case, it has been applied to cases post-*Crawford*. In *People v. Cervantes* (2004) 118 Cal.App.4th 162, defendants Cervantes, Martinez, and Morales were tried together and convicted of first degree murder. On the day of the murder, Morales made a statement to his neighbor, Ojeda. He told Ojeda that he, Martinez and Cervantes held two males at gunpoint because they believed the men had made advances toward Morales's girlfriend. Morales struck one of the men with his handgun and told Martinez to search them for weapons. Martinez did not find a weapon, but Morales said one of the men had a weapon. Morales shot one man, and when the second man ran, Morales and Cervantes shot him, too. (*People v. Cervantes*, *supra*, 118 Cal.App.4th at p. 167.)

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[5] Evidence Code section 1230 states, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

The trial court found that Morales's statement had sufficient indicia of trustworthiness and reliability based on the totality of the circumstances to be admitted under the declaration against penal interest exception to the hearsay rule. (*People v. Cervantes, supra,* 118 Cal.App.4th at p. 170.) On appeal, Martinez and Cervantes argued the statements were not trustworthy because Morales tried to shift blame and attempted to place himself in a more sympathetic light. In addition, they argued Ojeda's testimony should have been limited to statements specifically disserving only to Morales, and the statement should have been redacted pursuant to *Aranda/Bruton.*

The appellate court found that Morales's statement to Ojeda was not testimonial and thus did not violate the rules established in *Crawford.* Next, the court applied *Greenberger* and concluded that Morales's statement was admissible against Cervantes and Martinez because it was trustworthy. "The evidence here showed Morales made the statement within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses. Further, it is likely Morales wanted to have his wounds treated without going to the hospital. Regarding the content of the statement, Morales did attribute blame to Cervantes and Martinez but accepted for himself an active role in the crimes and described how he had directed the activities of Martinez. Thus, Morales's statement specifically was disserving of his penal interest because it subjected him to the risk of criminal liability to such an extent that a reasonable person in his position would not have made the statement unless he believed it to be true." (*People v. Cervantes, supra,* 118 Cal.App.4th at pp. 176-177.) The appellate court found that Morales's statement need not be redacted to exclude all reference to the nondeclarants as long as the statement was disserving to the interests of the declarant, in that case Morales. (*Id.* at pp. 176-177.)

Here, the trial court went through several transcripts of Mendoza's telephone calls and selected those statements which were "specifically disserving" to Mendoza's interests. The court admitted Mendoza's statement to one of his friends that

he "can't be letting that bitch go to court. Fuck, tie her ass up, and throw her in the closet for that day, or something, shit." In another conversation, Mendoza told his brother to contact one of his friends and set up a three-way call. When he talked to this friend, Mendoza asked, "Did you ever get rid of that yet?" These statements, which Mendoza made while incarcerated for attempted murder, were made to his family and friends under circumstances indicating reliability. They implicate Mendoza's penal interest because he is discussing what to do with a potentially adverse witness to the crime for which he was charged. Mendoza made no reference to Armendariz. He did not seek to shift blame or implicate his codefendant in any way. Therefore, the trial court correctly admitted Mendoza's statements at Armendariz's trial.

Armendariz also suggests the court's instructions to the jury limiting the purpose for the admission of Mendoza's statements actually served to suggest Armendariz tried to dissuade a witness. However, there was no objection to this instruction on the grounds raised on appeal. Therefore, the issue is waived. (*People v. Stone* (2008) 160 Cal.App.4th 323, 331.) Moreover, the prosecutor presented evidence that Armendariz made statements to various friends that he wanted to know "where [his girlfriend's] head is at" and wanted to "make sure everything is still straight." Therefore, the instruction was properly given based on Armendariz's own statements about the testimony of potential witnesses.

Sufficiency of the Evidence

Armendariz challenges the sufficiency of the evidence to prove his identity as one of the men involved in the Johnson shooting, and to prove he harbored the specific intent to kill Johnson. """On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.]" [¶] """"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to

determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

Armendariz points to Crotzer's trial testimony that neither he nor Mendoza was at her home on the night of the shooting, various inconsistencies between Johnson's testimony and his pretrial statements, Johnson's admitted alcohol and drug use on the night of the shooting, and the DNA documentation "mix-ups," as proof that all of the prosecution's inculpatory evidence should be disregarded. However, as noted above, an appellate court is not free to substitute our evaluation of the witnesses' credibility for the jury's determination of that issue.

On the other hand, while the record reveals that Johnson admitted drinking one beer and smoking marijuana two or three hours before the incident at Crotzer's house, he did have three opportunities to see Armendariz — twice at Crotzer's house, and once when Armendariz pointed a gun at him. Further, Johnson immediately identified Armendariz as the shooter, and Crotzer initially identified Armendariz and Mendoza as the two men who had been at her home on the night of the shooting. She also told the officers that both men left her house in an SUV. While Crotzer denied knowing Armendariz and testified that he was not the person who had been at her house, the prosecution presented ample evidence to impeach her trial testimony.

Moreover, the physical evidence supports the jury's verdict. Police officers found .38 caliber cartridges at the scene and a loaded .38 caliber semi-automatic pistol between Armendariz's mattress and box springs just hours after the shooting. When tested for GSR approximately nine hours after the shooting, Armendariz had a single GSR particle on his left hand. Finally, while the San Bernardino County analyst admitted making an error in recording information about the DNA samples, she retested one

sample to verify her results. Thus, substantial evidence supports the jury's determination that Armendariz was the person who shot Johnson.

With respect to Armendariz's intent during the commission of the crime, we can infer intent from his actions and the circumstances of the offense. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Here, Armendariz ordered Johnson out of Crotzer's house, and when Johnson realized he was being followed, it was Armendariz's face that appeared in the pursuing car's window. In addition, Armendariz aimed and fired at least four shots at Johnson. He did not fire just one shot, or even several shots into the air, facts that would have been consistent with an attempt to scare rather than to kill. Instead, Armendariz pointed his weapon directly at Johnson and pulled the trigger at least four times. Under the circumstances, we find sufficient circumstantial evidence supports the jury's determination that Armendariz acted with the intent to kill.

Great Bodily Injury and Firearm Enhancements

Although Johnson identified Armendariz as the shooter and tests revealed one particle of GSR on Armendariz's left hand, he argues on appeal that the jury could have relied on an improper aiding and abetting theory to find true the personal use of a firearm and personal infliction of great bodily injury enhancements. We disagree.

Armendariz speculates that "the jury could also have convicted [him] of attempted murder and shooting at an occupied vehicle, and found the firearm and great bodily injury allegations true based on an aiding and abetting theory." However, nothing in the record supports this statement. The verdict forms required the jury to find Armendariz personally used a firearm and personally inflicted great bodily injury. Pointing to CALCRIM No. 401, the standard instruction on aiding and abetting, Armendariz contends the jury instructions could be interpreted in such a way that the jury could have made improper findings. To the extent Armendariz believes the instructions on aiding and abetting required amplification or clarification, it was his duty to request such clarification at trial. The failure to do so waives the issue on appeal. (*People v. Fiu*

(2008) 165 Cal.App.4th 360, 370.) We conclude the prosecution amply proved Armendariz's guilt as the direct perpetrator of the crimes. Consequently, there was no violation of his state or federal Constitutional right to due process and a fair trial.

Prosecutorial Misconduct

Armendariz contends the prosecutor repeatedly ignored the trial court's evidentiary rulings and engaged in a pattern of misconduct so egregious that it violated his constitutional rights to due process and a fair trial. He points to five acts of purported misconduct: (1) The prosecutor attempted to elicit other crimes evidence, and evidence of Armendariz's prior gun possession and threatening behavior, during his examination of Detective Leo Griego; (2) made repeated attempts to introduce gang evidence; (3) provided transcripts of Armendariz's recorded telephone calls to Mendoza's jury; (4) failed to disclose to the defense that one of the prosecution's witnesses, Tina Mendoza, had a prior conviction for misdemeanor battery; and, (5) failed to provide timely discovery.

We first point out that Armendariz failed to object to any of the alleged acts of misconduct at trial. "'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) A defendant may be excused from a failure to object and request for a curative admonition if (1) such an objection and request would have been futile, (2) an objection was made without opportunity to request a curative admonition, or (3) a timely admonition would not have cured the harm. (*Ibid.*) None of these circumstances is present here. Therefore, the issue has not been preserved for appeal.

Nevertheless, we also find no prejudice as a result of trial counsel's failure to object on grounds of prosecutorial misconduct. "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's

. . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) We find no pattern of reprehensible conduct here.

Armendariz contends the prosecutor repeatedly sought to introduce other crimes evidence. However, as he acknowledges, the jury did not hear evidence of other crimes. The same is true of Armendariz's second contention. Regardless of the prosecutor's arguments to the court, the jury never heard evidence of Armendariz's prior gun possession or threatening behavior.

With respect to evidence regarding Armendariz's involvement in a criminal street gang, we note that the fourth amended information contained gang enhancement allegations, but that these allegations were stricken by the court before trial. On appeal, Armendariz argues the prosecutor committed misconduct, but he cites only portions of the record where the prosecutor made offers of proof or legal arguments in support of his position that gang evidence was relevant to prove motive and intent. And, as Armendariz admits, no "gang evidence was admitted at trial, and the court's ruling was upheld."

We also reject Armendariz contention that the prosecutor improperly gave Mendoza's jury copies of his telephone transcripts. It is clear from the record that while the prosecutor did inadvertently give Mendoza's jury the wrong exhibits, these transcripts were collected shortly after the error was discovered. Furthermore, any such error would have affected Mendoza's case much more than Armendariz's, but neither defense attorney objected to the error on the grounds of prosecutorial misconduct.

We find similarly unavailing Armendariz's argument that the prosecutor committed misconduct by failing to inform defense counsel that one of the prosecution's

own witnesses, Tina Mendoza, had a misdemeanor battery conviction. First, neither defense attorney objected to the late disclosure on misconduct grounds, nor did either attorney express the desire to address the issue. Both attorneys stated that the issue was moot because the witness had already testified. Furthermore, Armendariz fails to explain how the prosecutor's inadvertent nondisclosure caused prejudice to his case.

Finally, Armendariz argues that the prosecutor failed to provide timely discovery of certain evidence, and that the trial court abused its discretion by not excluding these items of evidence. We find no error.

Section 1054 et seq. governs discovery in criminal cases. (*People v. Tillis* (1998) 18 Cal.4th 284, 289.) Section 1054.5, subdivision (b) states, "Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

Based on the foregoing, it is clear that the trial court may consider a wide range of sanctions for proven discovery violations, including no sanction at all. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) However, Armendariz has failed to jump the first hurdle— he has not demonstrated that the prosecutor committed any violation of the criminal discovery statutes. But even assuming some violation occurred, Armendariz also fails to establish that he complied with section 1054.5, subdivision (b), to compel discovery. Moreover, while Armendariz argues the court abused its discretion by denying defense objections and not excluding various items of evidence, he fails to demonstrate either that the prosecutor acted willfully to withhold or delay discovery, or

that he suffered any prejudice as a result of the prosecutor's actions. Only the most egregious cases require exclusion of evidence. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.) Consequently, Armendariz has also failed to demonstrate that any of the trial court's evidentiary rulings constitute an abuse of discretion.

Section 12022.53, subdivision (d)

The jury found true numerous firearm and great bodily injury enhancement allegations. The trial court imposed and stayed the section 12022.53, subdivision (d) enhancement attached to count 2. Armendariz raises two challenges to the court's imposition of sentence for the section 12022.53, subdivision (d) enhancement. First, he contends the proper procedure is for the court to strike "redundant enhancements," not impose and stay sentence. Second, he contends all section 12022.53 enhancements related to count 2, shooting at an occupied vehicle (§ 246), must be reversed because section 246 is not one of the enumerated felonies under section 12022.53, subdivisions (b) and (c).

With respect to Armendariz's first contention, the California Supreme Court has recently held that lesser enhancements, as defined by section 12022.53, subdivision (f), must be imposed and stayed, rather than stricken by the trial court. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130.) We are bound to follow this holding, and therefore reject Cook's contention. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Armendariz' second contention is no more persuasive. Section 12022.53, subdivision (d) states, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), *Section 246*, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (Italics added.) According to the

verdict forms, the jury specifically found true the section 12022.53, subdivision (d) enhancement allegation and substantial evidence supports the jury's finding. Therefore, the trial court properly imposed sentence for the enhancement.

Armendariz also contends he did not receive proper notice of the section 12022.53, subdivision (c) allegation because it was not set forth in the information. We summarily reject this contention. The fourth amended information, like its predecessors, alleged violations of section 12022.53, subdivisions (b), (c), and (d) with respect to count 2. Consequently, Armendariz received adequate notice of the enhancement allegations prior to trial.

III

DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.